Supreme Court, U.S.
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No. 08-1540

IN THE

Supreme Court of the United States

FRED DIXON, PETITIONER

v.

MIAMI-DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Both federal courts below imputed to petitioner a present knowledge of *future* illegal inspections of his property in order to determine when his § 1983 claim for these wrongs accrued. Does the dismissal of his claims as time-barred violate *Wallace v. Kato*, 549 U.S. 384(2007), *United States v. Kubrick*, 444 U.S. 111(1979) and *Urie v. Thompson*, 337 U.S. 163(1949)?

2. Were respondent's warrantless inspections of petitioner's property and its demolition of his building based thereon actionable under 42 U.S.C. § 1983?

3. Was petitioner denied a fair hearing consistent with due process on respondent's summary judgment motion where it was heard before petitioner's deposition was concluded and before he could marshal his opposition materials to show the existence of genuine issues of material fact for trial?

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The unpublished and unreported *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit in *Fred Dixon v. Miami-Dade County, Florida*(C.A. No. 08-13548), decided January 8, 2009, affirming the District Court's entry of summary judgment against petitioner on the grounds that his civil rights action was time-barred, is set forth in the Appendix hereto(App. 1-2).

The unpublished and unreported Order of the United States District Court for the Southern District of Florida, Miami Division, in *Fred Dixon v. Miami-Dade County, Florida* (Civil Action No. 05-22120-CIV-JORDAN), entered December 27, 2007, allowing respondent's motion for summary judgment on the basis that petitioner's suit for damages under 42 U.S.C. § 1983, was time-barred(App. 3-7).

The unpublished order of the United States Court of Appeals for the Eleventh Circuit in *Fred Dixon v. Miami-Dade County, Florida*(C.A. No. 08-13548), filed on March 9, 2009, denying petitioner's timely filed petition for rehearing and for rehearing *en banc* is set forth in the Appendix hereto(App. 8).

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals affirming the District Court's entry of summary judgment against petitioner on the basis that his civil rights action for damages was time barred, was entered on January 8, 2009; and its order denying petitioner's timely filed petition for rehearing and for

rehearing *en banc* was filed on March 9, 2009(App. 8). This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of petitioner's timely filed petition for rehearing and for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1988(a):

> **Applicability of statutory and common law.**
> The jurisdiction in civil and criminal matters conferred on the district courts...shall be exercised and enforced in conformity with the laws of the Untied States...; but in all cases where they are not adapted to the object..., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended and govern the said courts in the trial and disposition of the cause....

Fed. R. Civ. P. 56(c), (e)(1), (e)(2) and (f):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> ....
> **(e)(1) and (2). Affidavits; Further Testimony.**
> (1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.....The court may permit an affidavit to be supplemented or

opposed by depositions, answers to interrogatories, or additional affidavits.

(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

.....

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken;

or

(3) issue any other just order.

STATEMENT

Petitioner Fred Dixon ("petitioner") is an African-American citizen who owns a number of properties within the territorial limits of respondent Miami-Dade County, Florida ("respondent"), including properties located at 3341 N.W. 211 Street, 1545 N.W. 183rd Street, 1555 N.W. 183rd Street and 6611-6645 N.W. 27th Avenue. From the summer of 1999 to July of 2000, petitioner sought and obtained respondent's approval for the re-zoning of his property at 6611-6645 N.W. 27th

Avenue in order that it could be used for the operation of a truck dealership.

At the same time and unbeknownst to petitioner, respondent throughout most of 2000 was sending its inspectors and other building officials onto petitioner's property at 6611-6645 N.W. 27th Avenue on numerous occasions in order to inspect the property and the buildings it contained without giving him notice, without obtaining petitioner's permission and without a search warrant (App. 2;4). The property was fenced in and locked prior to entry by respondent's agents; and the buildings' windows and doors were locked and secured at all times prior to entry by respondent's inspectors and building officials.

Respondent carried out these searches and seizures of petitioner's land and buildings pursuant to its written policy reflected in Section 8-5(d) of the South Florida Building Code, now the Florida Building Code. This Section provides that the respondent's Building Official/Inspector

> on his own initiative or as the result of reports by others, shall examine or cause to be examined every building or structure appearing or reported to be unsafe....

These administrative inspections of petitioner's land and buildings, taken by respondent's agents without knowledge or permission of petitioner, the property owner, were unconstitutional violations of petitioner's fourth amendment right to be secure against unreasonable searches and seizures by the government (App. 2;4). See *See v. City of Seattle*, 387 U.S. 541,

545(1967); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 535(1967).

In the aftermath of its unreasonable searches and seizures of petitioner's land and buildings at 6611-6645 N.W. 27th Avenue throughout 2000 and using the information it gained during those unlawful entries, respondent in the latter part of 2000 notified petitioner that one of the buildings on his property was unsafe within the meaning of the Florida Building Code and would be demolished if certain repairs were not made to the structure. Respondent did not advise petitioner that its knowledge about this allegedly unsafe structure was gained as the result of its unreasonable searches and seizures upon his property in 2000.

In December of 2000, the State of Florida's Unsafe Structures Board heard the respondent's claim that one of petitioner's buildings needed to be demolished if certain repairs were not made to the structure(App. 4). Upon petitioner's arrival at this hearing, respondent's agents told him that someone had reported that his property and the structure thereon were unsafe and that as a result its inspectors went to the property and took pictures **from outside the fenced-in area without actually entering the property or any of the buildings situated thereon.**

Petitioner first learned of these unreasonable searches and seizures on March 18, 2002, when he received a printout containing an outline of respondent's inspection activity on his property, a file which also included photographs. However, because petitioner was not aware of respondent's unreasonable searches and seizures at the time of the hearing before

the Unsafe Structures Board in December of 2000, he could not challenge respondent's proof regarding the extent to which the building on his property was unsafe by contesting its use of illegally obtained evidence gathered on its own initiative by carrying out searches of petitioner's property without notice to him, without his permission and without a search warrant.

The Unsafe Structures Board accepted the proof of respondent's building official, relying upon legally insufficient and inadmissible evidence, ordering petitioner to complete certain repairs to his building within a certain period of time or risk its demolition (App. 4-5).

From December 26, 2000, to August of 2001, respondent through its building officials on at least nine (9) separate occasions continued to enter upon petitioner's property at 6611-6645 N.W. 27th Avenue and inspect the buildings there without notice to petitioner, without his permission and without a search warrant, all in violation of this Court's decisions in *See* and *Camara*(App. 2;4). Specifically, petitioner claimed that

> [f]rom December 26, 2000, to August 2001 [including but not limited to 12/26/00, 1/26/01, 1/29/01, 2/7/01, 2/20/01, 3/2/01, 3/8/01, 5/23/01, 7/19/01] County Inspectors/Building Officials continued to enter [petitioner's] 6611-6645 N.W. 27th Avenue property and the building situated thereon on their own initiative without notice to him, his permission, or a warrant ...pursuant to the County's written policy in Section 8-5(d) of the Florida Building Code....

As before, respondent undertook these administrative searches and seizures of petitioner's land and buildings pursuant to its written policy reflected in Section 8-5(d) of the Florida Building Code. Once again, petitioner first learned of these unreasonable searches and seizures on March 18, 2002, when he received a printout containing an outline of respondent's inspection activity on his property, a file which also included photographs.

In April of 2001, respondent held a hearing without petitioner present and determined that the building on petitioner's property at 6611-6645 N.W. 27th Avenue would be demolished after ninety (90) days if petitioner did not make the building safe in the interim. Despite the fact that petitioner's building at 6611-6645 N.W. 27th Avenue was never at any time an "unsafe" structure as that term is used by the Florida Building Code, respondent on August 10, 2001, without adequate notice to petitioner, without his permission and without a search warrant, forcibly entered onto petitioner's property at 6611-6645 N.W. 27th Avenue and demolished the building situated thereon.

Alleging these facts, petitioner on August 2, 2005, brought this civil rights action under 42 U.S.C. § 1983, against respondent in the federal district court for the Southern District of Florida, Miami Division, seeking injunctive relief together with compensatory and punitive damages stemming from the respondent's demolition of his building. In a second amended complaint, petitioner alleged in Count I that respondent's written policy and its practical execution of administrative searches and seizures without notice to landowners, without their permission and without a search warrant violates not only this Court's decisions

in *See* and *Camara* but also the fourth amendment's protection against unreasonable searches and seizures(App. 3). He sought an injunction against further violation of his rights by respondent and damages for the delay in the commercial development and use of his property as a truck dealership, his public shame and humiliation and his emotional pain and suffering.

In Count II, petitioner claimed that respondent pursued a policy and practice of applying the unsafe structure provisions of the Florida Building Code in such a manner that it destroyed the value of his property, was tantamount to a taking and denied him due process under the fifth amendment. He claimed that any taking damages could not justly compensate him for the search and seizure of his property before or after the hearings which preceded the respondent's demolition of his property; nor did such a remedy permit recovery for the search and seizure of the property just before, during or after the demolition itself. He sought damages for the economic losses he incurred thereby.

Count III sought damages for respondent's depriving petitioner of substantive due process under the fifth amendment as the result of its arbitrary and capricious inspection policies and procedures "by inspecting [his property and buildings] on its own initiative without notice to him, a [search] warrant or his permission at the Building Official's own discretion."

Respondent moved to dismiss this second amended complaint because under Count I's fourth amendment claim there was no showing that

petitioner's "alleged injuries were...the result of any Miami-Dade County custom or policy;" because under Count II's fifth amendment "taking" claim petitioner had not exhausted his state remedies; and because under his Count III's fifth amendment substantive due process claim, "the destruction of property does not implicate any fundamental right."

During the course of briefing its motion to dismiss, respondent continued to claim that its knowledge about the unsafe condition of petitioner's building was gained as a result of its inspectors going to the property and taking pictures **from outside the fenced-in area without actually entering the property or any of the buildings situated thereon.** In fact, respondent's brief asserts that the online printout containing an outline of all the inspection activity concerning his property, i.e., the public record of the Building Department's inspections of his property, "does not state otherwise."

On April 24, 2007, the district court granted for the most part respondent's motion to dismiss petitioner's second amended complaint(App. 3). The only claim left standing was petitioner's allegations in Count I that respondent's warrantless administrative searches prior to its demolition of petitioner's building on August 10, 2001, i.e., between February of 2000 and July of 2001, violates this Court's decisions in *See* and *Camara* as well as the fourth amendment's protection against unreasonable searches and seizures(App. 3). The district judge rejected respondent's argument that these unlawful inspections were not its policy, custom or practice; instead, he concluded that in view of Section 8-5(d) of the Florida Building Code which on its

face allows for warrantless intrusions onto private property by respondent's agents, it could be the "moving force" behind petitioner's constitutional injury warranting damages under 42 U.S.C. § 1983(App. 3).

Respondent answered petitioner's second amended complaint as modified by the district judge's ruling. Discovery ensued with the taking of petitioner's deposition on October 11, 2007. During this deposition, petitioner testified that during the hearing before the Unsafe Structures Board on December 20, 2000 where respondent claimed that one of petitioner's buildings needed to be demolished if repairs were not made to the structure, he was told repeatedly by respondent's agents that its knowledge about the unsafe condition of his building was gained as a result of its inspectors going to the property and taking pictures **from outside the fenced-in area without actually entering the property or any of the buildings situated thereon.**

Petitioner also testified, however, that he couldn't believe this assertion since respondent's knowledge of the inside of the building was incompatible with only an outside view from behind the fence; and he told respondent's agents at the hearing that their conduct prior to this December 2000 hearing in entering upon the property in order to inspect it without giving him notice, without his permission and without a warrant was unconstitutional. Petitioner's deposition concluded for the day upon the express agreement by counsel in the record to reconvene at a mutually agreeable time.

Less than a month later, on November 7, 2007, with petitioner's deposition not yet finished,

respondent moved for summary judgment on Count I contending that petitioners remaining claim for the admittedly unconstitutional inspections of his property between February of 2000 and July of 2001 is barred by the four-year statute of limitations applicable to petitioner's § 1983 suit. Respondent argued that petitioner during his deposition admitted that he "had knowledge of the facts supporting his fourth amendment claim more than four years before he brought this action" on August 2, 2005.

As respondent contended in its supporting memorandum of law,

> contrary to the allegations of the Second Amended Complaint [that petitioner first learned of the warrantless inspections on March 18, 2002],...[petitioner] admitted in his deposition that he learned of the searches and their alleged illegality on December 20, 2000, when the [respondent's] Unsafe Structures Board held a hearing to consider whether the building was unsafe.
>
> At the hearing,...[petitioner]...learned that the [respondent] had inspected the interior as well as the exterior of his building, without his consent....As soon as he heard the inspector describe the building and the inspections, [petitioner] knew that his constitutional rights had been violated.

(Respondent's Memorandum of Law at 3). Respondent therefore argued that the four-year statute of limitations period for bringing suit under § 1983 for

redress of its unconstitutional inspections began to run on December 20, 2000, expired on December 20, 2004, and petitioner's present suit brought on August 2, 2005, was accordingly time-barred as a matter of law.

Petitioner's attorney was serving as defense counsel in a State murder trial as well as in another federal criminal matter and could not immediately respond to respondent's summary judgment motion. Moreover, petitioner's deposition had not yet been concluded as agreed upon by counsel. Petitioner therefore sought an extension of time in order to complete discovery and respond to respondent's motion. Because of the time constraints, counsel's ongoing commitments in State court and petitioner's incomplete deposition, petitioner was unable to file an opposition to respondent's summary judgment motion(App. 7).

On December 27, 2007, the district court issued its order granting respondent's motion for summary judgment(App. 3-5). It found that from February of 2000 to December of 2000, respondent's building inspectors entered onto petitioner's property at various times to inspect the safety of the building and they "did not have authority to" do so(App. 4). Relying upon testimony of petitioner's unfinished deposition, the district judge found that when petitioner became aware of these illegal inspections at the Unsafe Structures Board hearing on December 20, 2000, he confronted respondent's building inspector and told him that these unauthorized inspections of his building were unconstitutional(App. 4;6).

Upon these findings, the district court ruled that for purposes of determining when petitioner's fourth amendment claim under § 1983 accrued, petitioner knew or had reason to know on December 20, 2000, at the latest, that respondent had entered his property in violation of the law (App. 6). It thought that petitioner's "candid [deposition] testimony" was fatal to his claim, however, "as this action was filed on August 2, 2005---- more than four years after [petitioner] learned about the unauthorized entries and inspections"(App. 6-7). Because the motion judge believed that petitioner had only until December 20, 2004, to bring his § 1983 civil rights action seeking redress for **all** of respondent's unauthorized and illegal inspections between February of 2000 and July of 2001, he dismissed the action as time-barred(App. 7).

Petitioner timely filed motions for relief from judgment and to alter and amend the judgment asserting *inter alia* that the court mistakenly assumed that the sole basis for his remaining fourth amendment claims is the admittedly illegal inspections carried out by respondent from February 2000 through December 20, 2000, when he learned of these illegal searches at the Unsafe Structures Board hearing. That is, the district judge's ruling made no accommodation **for the various other, subsequent illegal inspections which respondent carried out on petitioner's property from December 26, 2000, through August of 2001, illegal searches by respondent which petitioner could not possibly have known about on December 20, 2000.**

Moreover, the district court's ruling failed to harmonize petitioner's assertion in his second amended

complaint that he first learned about all of these illegal searches-----not only the ones before December 20, 2000, but also the illegal inspections **after** December 20, 2000, through July of 2001----on March 18, 2002, when he first received the printout containing an online recitation of all respondent's surreptitious inspection activity on this property.

The district judge denied petitioner's post-judgment motions. Upon petitioner's appeal, the court of appeals affirmed the district judge in a *per curiam* opinion(App. 1-2). It ruled that the district court had properly ruled that all of petitioner's fourth amendment claims under § 1983 stemming from the respondent's illegal inspections of his property from February 2000 through July 19, 2001, as well as its demolition of the building on August 10, 2001, were time-barred(App. 1-2).

On March 9, 2009, the court of appeals denied petitioner's timely filed petition for rehearing and for rehearing *en banc*(App. 8).

REASONS FOR GRANTING THE PETITION

1. Imputing to Petitioner A Present Knowledge of *Future* Illegal Inspections of His Property in Order to Determine When His § 1983 Claim For These Wrongs Accrued Violates *Wallace v. Kato*, 549 U.S. 384(2007), *United States v. Kubrick*, 444 U.S. 111(1979) and *Urie v. Thompson*, 337 U.S. 163(1949).

42 U.S.C. § 1983 itself contains no statute of limitations for bringing a civil rights actions seeking

damages and declaratory or injunctive relief. However, 42 U.S.C. § 1988(a), instructs the federal courts to adopt the state law of the forum so long as this state law is not inconsistent with federal law. See *Moor v. County of Alameda*, 411 U.S. 693, 703-704(1973).

Since the "atrocities that concerned Congress in 1871 [when it enacted 42 U.S.C. § 1983] plainly sounded in tort" for personal injuries, *Wilson v. Garcia*, 471 U.S. 261, 277(1985); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305(1986), the forum state's personal injury limitations period will apply to § 1983 claims. *Id.* at 280. Moreover, *Owens v. Okure*, 488 U.S. 235, 249-250(1989) held that where the forum state provides multiple statutes of limitations for personal injury actions, federal courts considering § 1983 claims should borrow the general or residual limitations statute for personal injury actions. *Id.* at 250. In Florida, the forum state, the residual limitations period for personal injury actions is four years. See Fla. Stat. Ann. § 95.11(3). *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1103 & n. 2(11th Cir. 2002). *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188(11th Cir. 1999).

While Florida law defines the time within which petitioner must bring his § 1983 against respondent, **federal** law determines when petitioner's fourth amendment claims against respondent for its various illegal warrantless inspections of his property accrues, i.e, when the 4-year limitations period begins to run on petitioner's claims. *Wallace v. Kato*, 549 U.S. 384, 388(2007). The *Wallace* Court held that a § 1983 claim accrues when petitioner "has a 'complete and present cause of action.'" *Id.* citing *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*,

522 U.S. 192, 201(1997) and quoting *Rawlings v. Ray*, 312 U.S. 96, 98(1941). That is, petitioner's § 1983 claim against respondent accrues when petitioner can file suit and obtain relief, *Wallace, supra*; *Bay Area Laundry, supra*; or, stated another way, when petitioner knows or has reason to know of his injury. *Wallace, supra. Eidson v. Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 635(6th Cir. 2007)(post-*Wallace*). *Brademas v. Indiana Housing Finance Authority*, 354 F.3d 681, 686(7th Cir. 2004)(pre-*Wallace*).

The question of when on this record petitioner knew or had reason to know of his injury is informed by "the nature of the tort itself and the character of the injury [which] will frequently prevent knowledge" of it having taken place in real time. *United States v. Kubrick*, 444 U.S. 111, 123 & n.10(1979). For example, in employment discrimination cases, compensation disparities between men and women are "often hidden from sight" and kept confidential so that workers are kept uninformed of their colleagues' earnings. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649-650(2007)(Ginsburg, J., dissenting). Because of this attempt by the defendant to paper over the constitutional injury, there is no "immediately identifiable act of discrimination" upon which to found an accrual of the cause of action and charge the injured party with bringing suit. *Id.* at 651-652.

Likewise in *Urie v. Thompson*, 337 U.S. 163, 169-170(1949), this Court held that a claim under the Federal Employers' Liability Act did not accrue until petitioner's injury had "manifested itself." *Id.* Petitioner in *Urie* contracted silicosis from his work as a fireman on a steam locomotive, diagnosed only weeks

before he was too ill to work. *Id.* The Court was reluctant to charge petitioner with the "unknown and inherently unknowable" fact of his disease and held that because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under FELA until the disease had manifested itself rather than at any earlier date. *Id.*

Thus until a plaintiff is in possession of the critical facts that he had been hurt and who had inflicted the injury, the statute of limitations does not begin to run on the claim. *Kubrick, supra.* From this it follows that a defendant's fraudulent concealment of the material facts relating to the alleged wrong delays the accrual date until the plaintiff discovers or should have discovered the pertinent facts. *Wallace v. Kato*, 549 U.S. at 400-401(Breyer, J., dissenting). *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980). As Justice Breyer points out, where a petitioner "because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time," courts have applied the doctrine of equitable tolling. *Wallace, supra*, quoting *Miller v. Runyon*, 77 F.3d 189, 191(7th Cir. 1996).

With this law in mind, petitioner submits that the summary judgment record showed beyond dispute that while petitioner may have been on notice of the admittedly illegal inspections carried out by respondent from February 2000 through December 20, 2000, when he learned of these illegal searches at the Unsafe Structures Board hearing on December 20, 2000, there was absolutely no proof adduced by respondent that petitioner thereby was put on notice of respondent's

later illegal inspections which respondent carried out on petitioner's property from December 26, 2000, through July 19, 2001, **at least nine (9) illegal searches by respondent which petitioner could not possibly have known about on December 20, 2000.**

In fact, respondent adduced **no** evidence to contradict petitioner's allegation that he first learned of these later illegal inspections on March 18, 2002, when he received a printout containing an outline of respondent's surreptitious inspection activity on his property, a file which also included photographs. Because petitioner could not possibly have known at the time of the hearing before the Unsafe Structures Board on December 20, 2000, about these **future** illegal searches by respondent from December 26, 2000, through July 19, 2001, he could not possibly have had reason to know about these constitutional injuries within *Wallace's* holding. Nor had these **future** constitutional injuries "manifested themselves" in real time to hold petitioner to a knowledge of them within this Court's rationale in *Urie*.

Furthermore, the nature of the tort itself (i.e., surreptitious, warrantless inspections of petitioner's private but vacant property over the course of eight months) and the nature of the constitutional injury sustained(i.e., non-obvious but repeated trespass of vacant property and invasion of privacy), prevented petitioner from having knowledge that these illegal inspections were taking place in real time within the meaning of *Kubrick*; it was as much "hidden from sight" and kept confidential as the compensation disparities between men and women referenced by Justice Ginsburg in her dissent in *Ledbetter*. Finally,

respondent's surreptitious inspections amounted to the kind of fraudulent concealment of material facts relating to the alleged wrong which caused an irremediable lack of information about them and delayed the accrual date until petitioner reasonably discovered the pertinent facts on March 18, 2002. *Wallace v. Kato*, 549 U.S. at 400-401(Breyer, J., dissenting).

Accordingly, all of this decisional law and the record below demonstrates without dispute that petitioner had a complete and present cause of action on March 18, 2002, knowing then or having reason to know for the first time of his constitutional injury as the result of respondent's unlawful inspections from December 26, 2000, through July 19, 2001. Yet both of the courts below, following respondent's lead, combined these illegal searches with the unlawful searches respondent conducted before the hearing by the Unsafe Structures Board on December 20, 2000, to rule that petitioner's cause of action **for all these searches----before and after December 20, 2000**----accrued on December 20, 2000, with the 4-year limitations period expiring on December 20, 2004, thereby making time-barred his § 1983 suit begun on August 2, 2005.

In order to reach this result, the district court and the court of appeals unfairly imputed to petitioner on December 20, 2000, an awareness of respondent's *future* illegal inspections which had not even taken place yet but which respondent subsequently carried out on petitioner's property from December 26, 2000, through July 19, 2001, **at least nine (9) illegal searches by respondent which petitioner could not possibly have known about on December 20, 2000.**

This imputation of knowledge to petitioner of future illegal inspections in order to determine when his § 1983 cause of action accrued for these unlawful events is unfair, nonsensical and factually impossible. It denies petitioner a fair application of the precedents of this Court which hold that his claims with regard to these later inspections accrued when he had a complete and present cause of action, i.e., on March 18, 2002, when he received a printout containing an outline of respondent's surreptitious inspection activity on his property.

At the very least, the summary judgment materials raise a genuine issue of material fact for trial whether for purposes of determining the accrual of his § 1983 claims against respondent, petitioner knew or had reason to know of his constitutional injury at any time prior to March 18, 2002, when he first received the printout containing a recitation of all respondent's surreptitious inspection activity on his property.

2. Respondent's Warrantless Administrative Inspections and Its Demolition Of Petitioner's Building Based Thereon Are Actionable Under 42 U.S.C. § 1983.

The Warrant Clause of the fourth amendment protects commercial buildings as well as private homes. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311(1978). "To hold otherwise would belie the origin of that Amendment, and the American colonial experience" as a general warrant by the British was a "recurring point of contention." *Id.* In this regard, searches for administrative purposes, such as respondent's inspections here, are encompassed by the fourth

amendment. *Michigan v. Tyler*, 436 U.S. 499, 504-505(1978). "Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. These deviations from the typical police search are...clearly within the protection of the Fourth Amendment." *Id.*

The admittedly warrantless inspections carried out by respondent of petitioner's property at 6611-6645 N.W. 27th Avenue between December 26, 2000, and July 19, 2001, at least nine inspections which were without notice to petitioner, without his permission and without a search warrant, violate this Court's decisions in *See* and *Camara* and they are actionable under § 1983. Moreover, respondent's ultimate demolition of the building on August 10, 2001, was the result of these illegal inspections and the destruction of petitioner's structure is contaminated with the same illegality which renders these inspections actionable under § 1983.

As the *Camara* Court held, "[t]he basic purpose of the Fourth Amendment...is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials....[and] except in certain carefully defined classes of cases, a search of private property without a proper consent is unreasonable unless it has been authorized by a valid search warrant." 387 U.S. at 528-529.

Moreover, the Court in *See* could perceive no justification for "relaxing Forth Amendment safeguards where the official inspection is intended to

aid enforcement of laws prescribing minimum physical standards for commercial premises." 387 U.S. at 543. Petitioner, "like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.* Even if justified by a perceived violation of regulatory laws, the inspector must still obtain a warrant before carrying out his inspection. *Id.* Respondent's failure to do so for the illegal inspections from December 26, 2000, through July 19, 2001, renders its conduct actionable under § 1983. *A fortiori*, respondent's demolition of petitioner's building based upon these illegal inspections is also actionable.

3. Petitioner Was Denied A Fair Hearing Consistent With Due Process When Respondent's Summary Judgment Motion Was Heard Before Petitioner's Deposition Was Concluded And Before He Could Marshal His Evidence To Prove The Existence Of Genuine Issues of Material Fact For Trial.

This Court in its superintendency role over the federal courts and the federal system is responsible for making rules for hearings and motions so that these rules provide the parties with due process under the fifth amendment in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

Respondent brought its motion for summary judgment prematurely before petitioner's deposition had been concluded, contrary to the agreement between counsel and at odds with the very purpose of summary judgment, i.e., to allow discovery to be

completed so that the motion can be decided upon a complete record where any genuine issues of material fact can then be identified. In support of its motion, respondent resorted to the unfinished deposition testimony of petitioner to contend that there were no genuine issues of material fact with regard to when he apprehended or should have apprehended that the illegal inspections of his property had taken place. In this way, the crucial question of when petitioner's § 1983 claim accrued for respondent's fourth amendment violations rested on his **unfinished** deposition testimony, an event which by agreement of counsel had not yet been concluded.

Beyond the unfinished deposition, petitioner's counsel was unavailable to oppose the summary judgment motion because (as respondent's counsel well knew) he was engaged in a capital case and another criminal matter in state court. Petitioner therefore could not marshal evidence or respond with opposing material in the short time provided by the Rule 56 protocol.

This scenario raises due process issues. "[I]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970) citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as whether petitioner knew or had reason to

know of his constitutional injury at any time prior to March 18, 2002, when he first received the printout containing a recitation of all respondent's surreptitious inspection activity on his property. *Id.* This constitutional right carries with it the right to have all the evidence adduced on this issue without one-sided renditions of evidence treated as fact, as it was below. *Armstrong v. Manzo*, 380 U.S. 545, 551-552(1965). *Grannis v. Ordean*, 234 U.S. 385, 394(1914).

In the context of this summary judgment motion, due process requires that petitioner be given sufficient notice of the motion and sufficient time to marshal and adduce his opposition materials. Moreover, it requires the motion not be brought prematurely so that petitioner had an opportunity to complete his deposition, the most crucial deposition in this litigation. Otherwise, this incomplete process skews the "facts" unfairly and unjustifiably against petitioner so that it denies him a fair hearing consistent with due process.

In *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958), the Court observed that "[t]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007). This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the lower federal courts to reassert their proper role in deciding summary judgment motions, i.e., reaffirming the thrust of *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133(2000) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986), which require them to draw all inferences in favor of petitioner as the nonmoving party and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter to the district court for further discovery and a trial on the merits of petitioner's claims that the unauthorized , illegal inspections of petitioner's property between December 26, 2000, and July 19, 2001, violated his fourth amendment rights and caused him damage; or provide him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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DO NOT PUBLISH

No. 08-13548 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FRED DIXON, Plaintiff-Appellant,

versus

MIAMI-DADE COUNTY, a political subdivision of the State of Florida, Defendant-Appellee.

January 8, 2009, Decided

January 8, 2009, Filed

Appeal from the United States District Court for the Southern District of Florida. D. C. Docket No. 05-22120-CV-AJ.

JUDGES: Before HULL, PRYOR and HILL, Circuit Judges.

OPINION

PER CURIAM:

Appellant Dixon seeks reversal of a judgment dismissing his claim for damages resulting from the entrance upon, inspection of, and ultimate demolition of a building on his property.

After extensive and somewhat troublesome litigation and the creation of an extensive record, the district court determined that appellant had been afforded full process insofar as the determination of the unsafe conditions of his building was concerned and that this process included sufficient evidence to support that determination.

Appellant had also asserted a claim for damages because the inspector had entered his premises without consent or warrant, a violation of the Fourth Amendment. After the district court had entered the order referred to above to dismiss the action, appellant moved for relief from and vacation of that order due to the Fourth Amendment claim. In a detailed analysis of the record, the district court concluded that the inspection, if it occurred as described, had taken place more than four years prior to the action, so the statute of limitations had run and the claim is time-barred.

Our review of these two orders and the extensive record upon which they are based demonstrates that the district court correctly analyzed the situation and that the orders were correctly and lawfully entered. The judgment of the district court is

AFFIRMED.

(trailing footnotes)
NO. 05-22120-CIV-JORDAN
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

FRED DIXON, Plaintiff,
vs.
MIAMI-DADE COUNTY, Defendant.

ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT

The County has filed a motion for final summary judgment arguing that Mr. Dixon's remaining Fourth Amendment claim is time barred. For the reasons stated below, the County's motion [D.E. 56] is GRANTED.[1]

I. Factual Background

Mr. Dixon's claims arise from the inspection and ultimate demolition of his building by the County. On August 2, 2005, Mr. Dixon sued the County pursuant to 42 U.S.C. § 1983, alleging numerous constitutional violations. I granted the County's motion to dismiss Mr. Dixon's claims, except as to the claim that the County's inspectors entered the building in violation of the Fourth Amendment. The County has now moved for final summary judgment, arguing that this claim is barred by the statute of limitations.

In deciding the County's motion for summary judgment, I draw all facts and reasonable inferences from the evidence of record in favor of Mr. Dixon. See Stewart v. Happy Herman's Cheshire Bridge, Inc., 117

F.3d 1278, 1285 (11 th Cir.1997). Mr. Dixon is the owner of a property located in Miami-Dade County. Until its demolition, the property had an old building, which Mr. Dixon had used throughout the years as a private dwelling and for multiple business purposes. See Dixon Dep. at 30-33. From February 2000 to December 2000, County building inspectors entered Mr. Dixon's property on various occasions to inspect the safety of the old building. The County's inspectors did not have authority to enter Mr. Dixon's property. See Compl. at Par. 7.

Based on the unauthorized entries and inspections, the County's unsafe structures board held a hearing on December 20, 2000 to determine whether Mr. Dixon's building was safe. At the hearing, a County building inspector presented documents and photographs showing that Mr. Dixon's building was missing all its windows, had exposed electrical wires, and did not have operable plumbing. See Statement of Material Facts, Ex. 1 (minutes of unsafe structures board hearing).

Mr. Dixon attended the hearing. By his own admission, he concluded on the date of the hearing that the County inspector had to have entered the building to obtain the information that he had presented to the board. See Dixon Dep. at 105. At the hearing, Mr. Dixon confronted the County inspector and told him that the unauthorized inspection of his building was unconstitutional. See id.

Ultimately, the unsafe structures board determined that the building was unsafe and ordered a number of repairs. The board warned Mr. Dixon that if the repairs were not made the building would be demolished. See

Statement of Material Facts, Ex. 4 (notice of board decision). Mr. Dixon did not comply with the repair order, and the building was demolished on August 10, 2001. See id, Ex. 6.

II. Legal Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. See id. at 323. That is, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). In making this assessment, the court "must view all the evidence and all factual inferences reasonably

drawn from the evidence in the light most favorable to the nonmoving party," and "resolve all reasonable doubts about the facts in favor of the nonmovant." See Stewart,117 F.3d at 1285.

III. Discussion

The County argues that Mr. Dixon's remaining Fourth

Amendment claim is barred by the statute of limitations. I agree and conclude that the County is entitled to final summary judgment. The statute of limitations for Mr. Dixon's claim under § 1983 is four years (borrowing the Florida residual personal injury statute of limitations). See City of Hialeah v. Rojas, 311 F.3d 1096, 1102 n.2 (11 th Cir. 2002) (internal citations omitted). The limitations period "does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." See Mullinax v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987). Therefore, as a threshold issue, I need to decide when Mr. Dixon knew or had reason to know that the County had entered his property in violation of the Fourth Amendment. See id. Mr. Dixon's deposition testimony establishes beyond any doubt that this occurred on December 20, 2000, at the latest.

Mr. Dixon testified that on December 20, 2000, the County inspectors presented the results of the inspections of his building at the unsafe structures hearing, which he attended. The detailed reports and photographs presented at the hearing made clear to Mr. Dixon that the County inspectors had entered his property:

> For what he said I had to draw the conclusion that he [the County inspector] had been on the inside because I figured it was impossible for him to know the problem he was telling me about without going inside. And that's when I told him that you broke into my place illegally.

See Dixon Dep. at 136. See also id, at 105, Mr. Dixon's

candid testimony is fatal to his claim as this action was filed on August 2, 2005 -- more than four years after Mr. Dixon learned about the unauthorized entries and inspections. I understand that the County inspector allegedly told Mr. Dixon that he had taken the pictures from outside his property. Nevertheless, as Mr. Dixon testified, this explanation was not credible given the detailed information presented to the board, e.g., inoperable plumbing, exposed wires, etc. At a minimum, the information presented at the hearing should have given Mr. Dixon reason to know that his Fourth Amendment rights had been violated.

IV. Conclusion

In sum, I conclude that Mr. Dixon knew or had reason to know about the unauthorized inspection of his building on December 20, 2000. Under the applicable statute of limitations, Mr. Dixon had until December 20, 2004, to file his § 1983 lawsuit. Accordingly, this action -- which was filed on August 2, 2005 -- is time barred, and the County is entitled to final summary judgment. A final judgment will be issued separately.

DONE and ORDERED in chambers in Miami, Florida, this 27th day of December, 2007.

Footnote

[1] The County has also filed a motion for final summary judgment by default [D.E. 65] based on Mr. Dixon's failure to file a memorandum in opposition to its motion for summary judgment. That motion is denied as moot

Filed: 3/9/2009

No. 08-13548 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FRED DIXON, Plaintiff-Appellant,

versus

MIAMI-DADE COUNTY, a political subdivision of the State of Florida, Defendant-Appellee.

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.